

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARON JACKSON,

Defendant-Appellant.

UNPUBLISHED

January 12, 2001

No. 214705

Wayne Circuit Court

LC No. 98-002782

Before: Cavanagh, P.J., and Saad and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his conviction, following a bench trial, of first-degree home invasion, MCL 750.110a; MSA 28.305(a), felonious assault, MCL 750.82; MSA 28.227, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced him to (1) a two-year consecutive prison term for the felony-firearm conviction, (2) thirteen to twenty years in prison for the home invasion conviction, and (3) two years and eight months to four years in prison for the felonious assault conviction. We affirm.

Defendant first argues that the trial court erred in finding him guilty of home invasion because (1) he had an alibi and (2) the eyewitness testimony was not credible. This Court reviews the findings of fact by a trial court sitting without a jury for clear error. *People v Thenghkam*, 240 Mich App 29, 44; 610 NW2d 571 (2000); MCR 2.613(C). Findings are clearly erroneous if, after reviewing the entire record, we are left with a definite and firm conviction that a mistake occurred. *Id.* at 43.

The victim, Donna Ross, testified that (1) she returned to her Detroit home on February 6, 1998, to find defendant in her bedroom; (2) before leaving the home through the bedroom window, defendant pointed a gun at Ross; and (3) defendant pointed the gun at her again before driving away in a “reddish-burgundy” Pontiac Grand Am with a temporary sticker in the rear window. Ross’ neighbor, Vernell Phillips, testified that on the same day, around the time of the crime, she saw defendant in the neighborhood driving a similar car. Three days later, when the police stopped defendant for an unrelated matter, he was driving a burgundy Grand Am with a temporary sticker.

Defendant testified that he was in Grand Rapids on February 6, 1998, and he provided an alibi witness, Rachelle Caston. Caston testified that she was defendant's friend and that he was with her in Grand Rapids on February 6, 1998.

Defendant contends that the trial court clearly erred in finding him guilty because Ross' identification testimony was not credible. Specifically, defendant contends that the police lineup from which Ross identified him rendered an inaccurate result because (1) Ross had previously described the perpetrator as having a dark complexion, and (2) defendant was the only one in the lineup with a dark complexion.¹ While an unduly suggestive lineup could render a lineup identification unreliable, a suggestive lineup is improper only if, under the totality of the circumstances, there is a substantial likelihood of misidentification. *People v Kurylczyk*, 443 Mich 289, 306, 318; 505 NW2d 528 (1993). Here, Ross testified that she got a good look at the perpetrator the night of the offense and that she had "no doubt" when she picked defendant out of the lineup. Phillips, too, testified that she was certain that defendant was the person she saw in the neighborhood around the time of the crime. Further, Ross gave a detailed description of the perpetrator shortly after the crime; this description largely matched defendant's description. Finally, Ross described a burgundy Pontiac with a temporary sticker in the window as the car she saw the perpetrator driving, Phillips testified that the person she saw in the neighborhood around the time of the crime was driving a red Pontiac with a temporary sticker in the window, and the police stopped defendant three days after the incident driving a burgundy Pontiac Grand Am with a temporary sticker in the window.

Generally, the weight to be accorded the witness' testimony regarding original observations is a matter for the trier of fact. *People v Hayton*, 28 Mich App 673, 676; 184 NW2d 755 (1970). Also, it is the responsibility of the trial court to weigh conflicting testimony, and due regard is given to the opportunity of the trial court to judge the credibility of the witnesses. See *Thenghkam, supra* at 44. Therefore, this Court will not judge the relative credibility of witnesses anew. *People v Givans*, 227 Mich App 113, 124; 575 NW2d 84 (1997). Here, the trial court heard the testimony from eyewitnesses Ross and Phillips, both of whom were subjected to thorough cross-examination, and evidently found them to be more credible than defendant's alibi witness. Accordingly, defendant's argument that the trial court erred in its findings of fact is without merit.

Next, defendant argues that his trial attorney rendered ineffective assistance by failing to request a *Wade*² hearing regarding identification, thereby foreclosing the opportunity for defendant to raise at trial the suggestiveness of the police lineup from which he was identified. To establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's unprofessional error or

¹ We note that the record does not support defendant's assertion on appeal that he was the only dark-complexioned person in the lineup. While defense counsel asked Ross at trial, "Do you see any other individuals in this line-up who have a dark complexion like Mr. Jackson?," Ross did not answer the question.

² *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

errors, the result of the proceedings would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Here, because defendant did not raise the issue of ineffective assistance of counsel in the trial court, our review is limited to mistakes that are apparent from the record. *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996).

We find no substantiation in the existing record for defendant's ineffective assistance claim. As previously noted, the record does not support defendant's assertion on appeal that he was the only dark-complexioned person in the lineup. While defense counsel asked Ross at trial, "Do you see any other individuals in this line-up who have a dark complexion like Mr. Jackson?," Ross did not answer the question. Because no evidence established that defendant was indeed the only dark-complexioned person in the lineup, we cannot find that defendant's attorney rendered ineffective assistance for failing to challenge the lineup on that basis.

Even assuming, *arguendo*, that defendant had a darker complexion than the others in the lineup, we would nonetheless find no basis for reversal. Again, a suggestive lineup is improper only if, under the totality of the circumstances, there is a substantial likelihood of misidentification. *Kurylczuk, supra* at 306, 318. Generally, physical differences between a suspect and other lineup participants do not, alone, constitute impermissible suggestiveness. *Id.* at 312, 318. The factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the perpetrator at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the perpetrator, the level of certainty expressed by the witness at the confrontation, and the length of time between the crime and the confrontation. *Id.* at 306, 308.

Here, Ross saw the perpetrator when she came home and found him in her bedroom. Although he pointed a gun at her and instructed her to back out of the room, Ross kept her eyes on him as she was backing away and watched him climb out of her window. From the window, Ross watched the perpetrator get into a car and drive away. Second, Ross gave a detailed description of the perpetrator and his vehicle to the police shortly after the crime occurred, and this description largely matched defendant's description. Third, Ross testified that she was certain that defendant was the perpetrator, and Phillips testified that she was certain that defendant was the person she saw in the neighborhood around the time of the crime. Fourth, the lineup took place only four days after the crime occurred. See *id.* at 307-308, 318. Finally, defense counsel closely questioned Ross and Phillips on cross-examination.

Thus, an analysis of the relevant factors in this case indicates that there was no substantial likelihood of misidentification and that, had trial counsel moved for a *Wade* hearing, defendant's chances for acquittal would not likely have been strengthened. Accordingly, even accepting as fact defendant's assertion that he was the only dark-complexioned person in the lineup, we find no ineffective assistance of counsel in trial counsel's failure to seek a *Wade* hearing.

Finally, defendant argues that his sentence of thirteen to twenty years for the home invasion conviction was disproportionate considering the surrounding circumstances and defendant's background. Under the *Milbourn* principle of proportionality, a sentencing court must impose a sentence that is proportionate to the seriousness of the crime and the defendant's prior record. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990); *People v Paquette*, 214 Mich App 336, 344-345; 543 NW2d 342 (1995). Since the Michigan Sentencing

Guidelines do not apply to the crime of home invasion, we review defendant's sentence exclusively for an abuse of discretion. *People v Compagnari*, 233 Mich App 233, 235-236; 590 NW2d 302 (1998).

Here, the presentence investigation report revealed that defendant had prior felony convictions for attempted unlawful driving away of an automobile and attempted possession with intent to deliver a controlled substance. Moreover, defendant escaped from a correctional center and absconded from parole; he committed the instant crime while on parole. The additional factors cited by the court as influential in the sentence passed down – the effect of the crime on the victim, society's need for protection, and the seriousness of the offense – were permissible factors to consider when fashioning an appropriate sentence. *People v Gould*, 225 Mich App 79, 89; 570 NW2d 140 (1997); *People v Girardin*, 165 Mich App 264, 266; 418 NW2d 453 (1987). Given these factors, as well as defendant's repeated failure to conform his conduct to the laws of society, defendant's thirteen- to twenty-year sentence for the home invasion conviction did not violate the principle of proportionality and was not an abuse of discretion.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Patrick M. Meter